(2)

No. 92-826

Supreme Court, U.S.
FILED
DEC 14 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LONNIE D. SNELLING, Petitioner

v.

THOMAS A. WESTHOFF, DAVID K. DOWLING, CHARLES EDWARD COBB, LESTER EUGENE SMITH, CARL PORTER AND JAMES P. CALLOWAY, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT THOMAS A. WESTHOFF'S BRIEF IN OPPOSITION

JANE A. SMITH
General Counsel
Missouri Dept. of Conservation
Missouri Bar No. 28681
P. O. Box 180
Jefferson City, MO 65102-0180
314/751-4115
Attorney for Respondent Thomas A. Westhoff

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a case may be dismissed when the complaint contains no factual allegations.

2. Whether petitioner has standing to request the review of issues which were addressed neither in the decision below nor in the record.

3. Whether petitioner has standing to request a review when he has not complied with the rules of this Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eighth Circuit are those named in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
BASIS FOR JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	3
COUNTERSTATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	8
I. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT	8
II. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF WHETHER PLAINTIFF'S PETITION WAS DETERMINED TO BE A CHALLENGE TO HIS CRIMINAL CONVICTION	10
III. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF LIABILITY UNDER 42 U.S.C. 1985(3)	12
IV. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ARGUMENT OF WHETHER DEFENDANT WESTHOFF HAD ENTERED INTO A CONSPIRACY WITH ALL DEFENDANTS	13
V. PLAINTIFF FAILED TO COMPLY WITH THE RULES OF THE COURT	14

VI. CONCLUSION 16

APPENDIX

Table of Contents 1A

Envelope By Which Defendant Was Served 2A-3A

Plaintiff's Proof of Service . 4A-5A

TABLE OF AUTHORITIES

Page

Adickes v. S.H. Kress and Company, 398 U.S. 144 9

Bowers v. Hardwick, 478 U.S. 186, 193 . . . . . 8, 9, 11

Briscoe v. LaHue, 460 U.S. 327 9

Griffin v. Breckenridge, 403 U.S. 88, 104 . . . . . 12, 13

Mazur v. Stein, 347 U.S. 201, 206 n.5 14

Snelling v. Westhoff, et al., 972 F.2d 199 (8th Cir. 1992) 8

United States v. Williams, 112 S.Ct. 1735, 1738 12

CONSTITUTION, STATUTES, REGULATIONS, GUIDELINES, AND RULES

U.S. Const. Amend. I 3

U.S. Const. Amend. V 3

U.S. Const. Amend XIV 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983, Civil Rights Act of 1871 . . . . . 3, 6, 9, 12

42 U.S.C. § 1985, Civil Rights Act of 1861 . . . . . 4, 7, 12, 13

42 U.S.C. § 1986, Civil Rights Act of 1871 5

No. 92-826

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LONNIE D. SNELLING, Petitioner,

v.

THOMAS A. WESTHOFF, DAVID K. DOWLING, CHARLES EDWARD COBB, LESTER EUGENE SMITH, CARL PORTER AND JAMES P. CALLOWAY, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT THOMAS A. WESTHOFF'S BRIEF IN OPPOSITION

Respondent Westhoff herein respectfully opposes a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered regarding this action on September 25, 1992.

OPINIONS BELOW

The decision of the district court granting summary judgment to the respondents was not reported. (Pet. 8a-19a) The decision of the court of appeals, affirming the district court and denying the suggestion for rehearing en banc the petition for rehearing, is reported at 972 F.2d 199 (8th Cir. 1992) (Pet. 2a-7a).

BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was decided on August 3, 1992. The suggestion for rehearing en banc and petition for rehearing were denied on September 9, 1992. This Court has jurisdiction to review the court of appeals pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law...abridging the freedom of speech, or...the right of the people peaceably to assemble.

United States Constitution, Amendment V:

> No person shall... be compelled in any criminal case to be a witness against himself.

United States Constitution, Amendment XIV:

> ...nor shall any state...deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute...of any State...subjects, or

causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...

Civil Rights Act of 1861, 42 U.S.C. § 1985 (2):

...if two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice in any state...with intent to deny to any citizen the equal protection of the laws...(3) the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

Civil Rights Act of 1871, 42 U.S.C. § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured...for all damages caused by such wrongful act.

COUNTERSTATEMENT OF THE CASE

This suit was instituted in the United States District Court for the Eastern District of Missouri against several individuals with plaintiff complaining that defendants violated his constitutional and civil rights during an

issuance of a state trespass complaint and the ensuing state prosecution of the complaint. The Plaintiff sued defendant Westhoff, the law enforcement officer who issued the trespass complaint; defendant Dowling, the county prosecutor; defendant Calloway, the owner of the real property where the trespass occurred; defendant Cobb, a witness for the prosecution at the trial for the trespass violation; and defendants Smith and Porter, residents of the area where the violation occurred. The essential claims against defendant Westhoff were that he issued the summons without cause, that he detained plaintiff without cause, and that he conspired with other defendants to deny plaintiff a fair trial. Plaintiff's claim is that defendant Westhoff violated his rights under the First, Fifth and Fourteenth Amendments and under 42 U.S.C. section

1983 and an alleged subsection (c) of 42 U.S.C. section 1985. Plaintiff demands money damages from the defendants personally, totaling over five million dollars.

Defendant Westhoff moved to dismiss on grounds of official immunity. The District Court dismissed defendant Westhoff on grounds of official and witness immunity. All other defendants were also dismissed on various grounds of immunity. Defendant Westhoff filed a motion for sanctions against plaintiff for the purpose of halting plaintiff's frivolous filings regarding law enforcement officials, particularly state conservation agents. The district court denied the motion.

Plaintiff appealed and defendant Westhoff cross-appealed. The Court of Appeals for the Eighth Circuit affirmed

the decisions of the Eighth Circuit. *Snelling v. Westhoff, et al.*, 972 F.2d 199 (8th Cir. 1992). Defendant Westhoff is not petitioning for the review of that cross-appeal. This Brief in Opposition is filed on behalf of Defendant Westhoff, who was acting in his official capacity as a state conservation agent and/or as a prosecution witness during the times in which he performed the acts upon which alleged liability is based.

5

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner claims that the decision below is in conflict with *Bowers v. Hardwick*, 478 U.S. 186, 193. *Bowers, supra*, held that not every civil rights claim filed should be manipulated by a court so as to provide a petitioner a

cause of action under the First, Fifth and Fourteenth Amendments. The Eighth Circuit, following *Bowers, supra*, held that petitioner failed to state a claim for which relief could be granted under the previously referenced amendments.

The decision below also adhered to the findings of *Briscoe v. LaHue*, 460 U.S. 325, 327, which held that a convicted state defendant, such as petitioner, cannot bring a section 1983 action asserting perjury against a law enforcement official, which was the status held by defendant Westhoff.

In his Argument (Pet. 7), plaintiff alleges the decision of the Eighth Circuit upholding the summary judgment was in conflict with *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 158. The lower court held in accordance with *Adickes*,

supra, that defendants had met the burden of showing the absence of any issues regarding any material fact.

The decision below is in compliance with the decisions of this Court.

II. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF WHETHER PLAINTIFF'S PETITION WAS DETERMINED TO BE A CHALLENGE TO HIS CRIMINAL CONVICTION.

Plaintiff requests in his Question (4) of his petition (Pet. i) a determination as to whether his complaint was labeled as a challenge to his criminal conviction. The Eighth Circuit did not decide that question in this proceeding since that issue was not presented by plaintiff. Moreover, the record will not support a determination of that issue by this Court.

It is difficult for defendant Westhoff to understand the substance of petitioner's Question (4). (Pet. i)

Plaintiff appears to be attempting to assert that since the lower decision utilized the theory of witness immunity that somehow the lower court was unable to separate the issues in plaintiff's complaint from his criminal conviction.

Petitioner states the decision below held that his complaint was a challenge to his criminal conviction and that the holding conflicts with *Bowers v. Hardwick*, 478 U.S. 186. The Eighth Circuit did not interpret petitioner's cause of action as a challenge to his criminal conviction. Further, the findings of *Bowers, supra*, which plaintiff cited did not relate to any criminal conviction.

The Eighth Circuit determined that defendant Westhoff possessed absolute witness immunity from plaintiff's claims of conspiracy and that plaintiff failed to

state a claim under section 1983 against defendant Westhoff.

The record of lower decision gives no indication that the Eighth Circuit perceived plaintiff's petition as a criminal complaint. Further, plaintiff did not present this issue to the lower court. Since the issue was not previously presented, this Court should not grant review. *United States v. Williams*, 112 S.Ct. 1735, 1738.

III. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF LIABILITY UNDER 42 U.S.C. 1985(3)

Plaintiff states that the lower court decision conflicts with this Court's opinions regarding 42 U.S.C. 1985(a)(c)(sic) (Pet. 6).

Defendant Westhoff is unaware of any subsections under section 1985, titled "a" or "c". Plaintiff cited *Griffin v. Breckenridge*, 403 U.S. 88 for his

position. *Griffin, supra*, at 104 addresses the issue of liability under section 1985(3).

Plaintiff never alleged any violation of section 1985(3), therefore, the Court cannot consider any issue regarding section 1985(3) for review.

IV. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ARGUMENT OF WHETHER DEFENDANT WESTHOFF HAD ENTERED INTO A CONSPIRACY WITH ALL DEFENDANTS

Plaintiff, in the argument portion of his petition (Pet. 11), states that defendant Westhoff had conspired with all the defendants. Plaintiff had never presented this issue to the courts below. Plaintiff had alleged that defendant Westhoff had conspired with two of the defendants, but plaintiff had never alleged a conspiracy which involved all the defendants.

Defendant Westhoff requests that the court not review an issue which had not been presented below. Plaintiff has also not presented the question of conspiracy involving all the defendants. When an issue is mentioned only in an argument but not as a question by the plaintiff, the issue is not properly before this Court. *Mazur v. Stein*, 347 U.S. 201, 206 n.5.

V. PLAINTIFF FAILED TO COMPLY WITH THE RULES OF THE COURT.

a) *Plaintiff did not serve respondent Westhoff by first-class mail.*

Plaintiff did not comply with Rule 29.3 which requires that any pleading, if service is by mail, must be mailed with first-class postage prepaid.

Plaintiff stated that he mailed his petition to defendant Westhoff on November 7, 1992, with first-class postage prepaid. Plaintiff did not mail the petition until November 9, 1992, and then mailed it with

fourth-class postage. (App. 2A-3A) Defendant Westhoff did not receive plaintiff's briefs until November 16, 1992.

The failure of plaintiff to comply with the Court's rules was not inadvertent, but is an example of plaintiff's standard practice. On five separate filings in the courts below, the date on plaintiff's certificate of service differed from the postmark.

b) *Plaintiff did not serve all defendants.*

Plaintiff did not further comply with Rule 29.3 as he did not serve respondent James P. Calloway. Rule 29.3 requires that each party or, if the party is represented, then the party's counsel be served with any pleading. Plaintiff's proof of service (App. 4A-5A) does not indicate any service to defendant Calloway

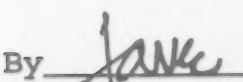
though the plaintiff declares that he has served each party to the proceeding.

The Court is requested to deny plaintiff's writ due to his unwillingness or inability to conform to the rules of this Court.

VI. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

By 

Jane A. Smith, General Counsel
Missouri Department of Conservation
Missouri Bar No. 28681
P. O. Box 180
Jefferson City, MO 65102-0180
314/751-4115
Attorney for Respondent Thomas A. Westhoff

APPENDIX

TABLE OF CONTENTS

Envelope By Which Defendant Was Served 2A-3A

Plaintiff's Proof of Service . . . 4A-5A

LONNIE SNELLING
1519 - 79th St
N. City, Mo. 63130

SPECIAL
4th CL. RATE

RECEIVED
NOV 16 1992
LEGAL SECTION

Jane A. Smith
General Counsel
P.O. Box 180
Jefferson City, Mo.
65102

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

NO _____

LONNIE D. SNELLING
PETITIONER.

---

vs.

THOMAS A. WESTHOFF,
DAVID K. DOWLING,
CHARLES EDWARD COBB,
LESTER EUGENE SMITH,
CARL PORTER, AND
JAMES P. CALLOWAY,
RESPONDENTS.

PROOF OF SERVICE

I Lonnie D. Snelling, do swear or declare that on this date, November 7, 1992, pursuant to Supreme Court Rule 29.3 and 29.4, I have served the attached PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in

the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows: Walter D. McQuie, Jr., Box 85, 227 N. Sturgeon Street, Montgomery City, Missouri 63361. Counsel for Lester Smith and Carl Porter. David H. Wendt, 7911 Forsyth, Suite 650, St. Louis, Missouri, 63105, Counsel for David K. Dowling. Jane A. Smith, P. O. Box 180, Jefferson City, Missouri, Counsel for Thomas A. Westhoff.

and

Nathan S. Cohen, 818 Olive Street, Suite 1135, St. Louis, Missouri 63101, Counsel for Charles Edward Cobb.

_____

Lonnie D. Snelling

SUBSCRIBED AND SWORN TO BEFORE ME THIS 7th day of November, 1992.

_____

Notary Public in and for the County and State